

IP 05-0044-CR 4 H/F US v Garnica
Magistrate Kennard P. Foster

Signed on 5/26/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
GARNICA, MARIA M,)	CAUSE NO. IP05-0044-CR-04-H/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	CAUSE NO. IP 05-44-CR-04-H/F
MARIA GARNICA,)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in an indictment returned on March 23, 2005 charging one count of conspiracy to possess with intent to distribute 5 kilogram or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The government moved for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(B), (f)(1)(C), and (f)(2)(A) on the grounds that the defendant is charged with a drug trafficking offense with the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, and the defendant is a serious risk of flight, if released. The detention hearing was held on May 20, 2005. The United States appeared by Josh Minkler, Assistant United States Attorney. Maria Garnica appeared in person and by her appointed counsel, Kenneth Riggins.

At the detention hearing, the Government rested on the presumption established by the indictment, and testimony from United States Drug Enforcement Administration Special Agent

Gerald C. Dooley. The Court found that the indictment constituted probable cause to believe that the defendant committed the crime charged. The charge in the indictment gives rise to the presumptions that there is no condition or combination of conditions of release which will reasonably assure the safety of the community or that the defendant will not be a serious risks to flee if released..

The evidence presented at the detention hearing did not rebut the presumptions that the defendant is a serious risks of flight, or rebut the presumption found in 18 U.S.C. § 3142(e) that the defendant is a danger to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and that by a preponderance of the evidence that the defendant will be a serious risk of flight if released. Consequently, the defendant was ordered detained.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1. The defendants is charged in an indictment returned on March 23, 2005 with one count of conspiracy to distribute and to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846.

2. Based on the amount of cocaine alleged in the indictment, the penalty for the conspiracy to possession with the intent to distribute and to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b) and 846 is a mandatory minimum sentence of 10 years and a maximum of life imprisonment.

3. The Court takes judicial notice of the Indictment in this cause. The Court further incorporates the evidence admitted during the detention hearing, as if set forth here.

4. The government submitted the matter on the indictment and the testimony of Special Agent Dooley. Special Agent Dooley testified that the conspiracy involved in excess of 150 kilograms of cocaine and that in excess of 30 kilograms of cocaine and \$300,000.00 in United states currency had been seized during the investigation of the conspiracy. Dooley testified that the defendant transported cocaine on three occasions for the conspiracy from California to Indianapolis. The cocaine was transported in a vehicle which had an after factory modification of hidden compartments. DEA agents in El Centro, California had observed the vehicle used to transport the cocaine in the driveway in front of the defendant's residence. The defendant was born in the Republic of Mexico, and the defendant's residence is less than 40 miles from the Mexican border. If the defendant fled to Mexico, the government of the republic of Mexico would not extradite the defendant without limiting the penalty Court could impose on the defendant if convicted.

The Court admitted the PS3s for Ms. Garnica. She refused a pretrial interview and none of the information could be verified. Although unemployed, it appears Ms. Garnica receives Social Security because of a disability.

5. The Court finds that the indictment establishes probable cause for the offense charged, and the rebuttable presumptions arise that the defendant is a serious risks of flight and a danger to the community. 18 U.S.C. § 3142(e).

6. In the first instance, the evidence at the detention hearing does not rebut the presumptions found in 18 U.S.C. § 3142(e) that the defendant is a serious risks of flight and a danger to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and that by a preponderance of the

evidence that the defendant will be a serious risk of flight if released. Therefore, Maria Garnica is ORDERED DETAINED.

7. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, § 3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. § 3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same).

In this case, the United States moves for detention pursuant to § 3142(f)(1)(B) (C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of § 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination

of conditions which would *guarantee* the defendant's appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

8. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant's appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case. The evidence presented at the detention hearing did not rebut the presumptions that the defendant is a serious risk of flight and a danger to the community.

10. Assuming *arguendo* the defendant had rebutted both of the presumptions, she would still be detained. The Court considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

11. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

- a. This case charges the defendants based on an incipient conspiracy involving large quantities of cocaine transported from California to Indianapolis by this defendant.
- b. The evidence admitted during the detention hearing demonstrates a strong probability of conviction.
- c. The possible mandatory minimum sentence of ten years and maximum of life for the drug charge for Ms Garnica coupled with the fact that she was born in the Republic of

Mexico and has ties to the Republic of Mexico substantially increases the seriousness of her risk of flight.

d. The defendant's involvement with this quantity of cocaine reflects she is a dangers to the community. .

e. The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that defendant has not rebutted the presumptions in favor of detention, and should be detained. Furthermore, she is, by the preponderance of the evidence, a serious risks of flight and clearly and convincingly danger to the community.

WHEREFORE, Maria Garnica is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. They shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendants to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this 26th day of May, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court

Distribution:

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